Filed 7/10/20 P. v. Jackson CA5

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>ELBERT JACKSON,<br><br>Defendant and Appellant. | F075502<br><br>(Super. Ct. No. BF166315A)<br><br>**OPINION** |

APPEAL from a judgment of the Superior Court of Kern County. Ralph W. Wyatt, Judge.

Renee Paradis, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Jennifer Oleksa, and Cavan M. Cox, Deputy Attorneys General, for Plaintiff and Respondent.

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Following an altercation at a bus stop, defendant Elbert Jackson was convicted of attempted robbery and misdemeanor assault, and sentenced to 12 years in prison. At the sentencing hearing, the trial court stated that it was "quite surprised" by the verdict, agreeing with defense counsel's earlier remark that the testimony of the prosecution's primary witness, the victim, had been "incongruous" and "frequently unintelligible." The court added that it found that testimony "exaggerated and embellished." It expressed its opinion that the incident had begun as one of "aggressive panhandling" on Jackson's part and devolved into an exchange of pepper spray and chunks of stucco because of "a misperception and a miscommunication by both sides." The court noted there was nothing it could do about this absent action by the defense. Jackson contends that, by failing at this point to make a motion for a new trial, his trial counsel provided him with ineffective assistance. We need not resolve this issue because, as addressed below, we will vacate the judgment and remand the matter for resentencing, whereupon Jackson, should he wish to, can bring a new trial motion.

We agree with the People that there is no reversible error in the mistaken reference to misdemeanor battery in the verdict form and the court's sentencing minute order, since it is otherwise clear that the conviction and sentence were for misdemeanor assault as a lesser offense included in assault with a deadly weapon. We agree with Jackson's argument that Penal Code section 654[1] required the sentence for misdemeanor simple assault to be stayed.

The parties agree that remand is required for the trial court to exercise its new discretion to consider whether to strike a five-year enhancement imposed pursuant to section 667, subdivision (a). The parties further agree that on remand the trial court must strike four prior prison term enhancements that were also imposed.

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**1** Subsequent statutory references are to the Penal Code except as indicated.

Jackson's sentence is vacated. The matter is remanded for a new sentencing hearing. Jackson shall have the option to file a new trial motion prior to resentencing.

## FACTS AND PROCEDURAL HISTORY

The district attorney filed an information charging Jackson with assault with a deadly weapon (§ 245, subd. (a)(1)) and attempted robbery (§ 212.5, subd. (c)). The information alleged one prior serious or violent felony,[2] making Jackson eligible for both a second-strike sentence (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)) and a five-year enhancement under section 667, subdivision (a). It also alleged that offense and four other prior felonies for which Jackson served prison terms,[3] each made him eligible for a one-year enhancement under section 667.5, subdivision (b).

The following account of the facts is supported by evidence and is consistent with the judgment; it is one of the accounts given at trial by John V.,[4] the witness who said Jackson attacked him. As will be seen later in this opinion, John gave other accounts inconsistent with this one. Jackson testified to his own account, which differed from all the accounts given by John, and a police officer testified about the account Jackson gave him at the time of his arrest.

John, according to his testimony, was sitting on a bus stop bench near his home. He had a backpack full of bottles and a large trash bag full of cans and he was waiting to take the bus to a recycling center. Jackson approached and asked him for a quarter. After John said no, Jackson took a chunk of stucco debris from the ground and threw it at John. It missed. Jackson proceeded to hit John with his fist. Then Jackson seized John's

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[2] Making a criminal threat (§ 422), conviction date July 27, 2011.

[3] Possession of a controlled substance for sale (Health & Saf. Code, § 11351), conviction date December 5, 2001; possession of a stolen vehicle (§ 496d, subd. (a)), conviction dates July 23, 2002, and December 11, 2006; unlawfully taking a vehicle (Veh. Code, § 10851, subd. (a)), conviction date October 2, 2008.

[4] We use the last initial here to protect the witness's identity pursuant to California Rules of Court, rule 8.90.

backpack from the bus stop bench, but John moved toward him and sprayed him with pepper spray. Jackson dropped the backpack and walked away with the pepper spray on his face. John picked up the backpack, walked home, and called the police.

The jury found Jackson guilty of attempted robbery, but not guilty of assault with a deadly weapon. It found him guilty of simple assault, a lesser included offense. In a bifurcated proceeding, the court found the prior offense allegations true with respect to count 1, and struck them with respect to count 2.

At the sentencing hearing in this matter, the court observed:

> "The testimony of the victim in this case has been described by defense counsel as being incongruous, frequently unintelligible. I would add to that exaggerated, embellished. The Court was quite surprised by the verdict. The Court is not in a position to take any other action than what's been presented by the defense, but the Court was within only a few feet of the victim testifying and the Court had a completely different take. The Court's take on this was this started out over a 25-cent—at best it was an aggressive panhandling incident that the Court viewed as being—was characterized by the defense as a miscommunication. The Court's take on it was a misperception and a miscommunication by both sides and resulted in what appeared to be, at one point, mutual combat. The pepper spray by the victim, the stucco by the defendant.
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> "The alleged theft of the backpack, the Court is unsure exactly what transpired in the picking up of the backpack, how that happened; however, the Court's not in a position to take any action other than what's been presented by the defense at this point in time. The Court does agree that this is a case where it would be unjust to impose the prior strike offense. The Court is going to dismiss it based on the factors in the Romero decision in the furtherance of justice also. The Court has considered the nature and circumstances of the present felony. The Court has looked at the prior history of the defendant. The Court finds that … striking the prior conviction would avoid an unjust sentence in this case and I am going to dismiss the prior strike. I know that's an unpopular decision, but I think that under the circumstances of this case having listened to the [testimony] within only a few feet watching the demeanor of the victim, the Court was quite surprised by him leaping off the witness stand to do a demonstration during the trial."

The court proceeded to grant Jackson's *Romero*[5] motion to strike his prior strike, sentencing him to the upper term of three years for robbery, and adding the five-year enhancement under section 667, subdivision (a), as well as four of the five one-year enhancements under section 667.5, subdivision (b). For assault, the court imposed a term of 180 days, concurrent with the robbery sentence for a total term of 12 years.

## DISCUSSION

### *I. The Asserted Failure to Move for a New Trial*

Jackson maintains that in light of the trial court's remarks at sentencing, and the support for those remarks to be found in the record, his trial counsel acted unreasonably in failing to make a motion for a new trial, and his convictions should be reversed on account of ineffective assistance of counsel.

One of the situations in which a new trial motion may be granted under section 1181 is "[w]hen the verdict or finding is contrary to law or evidence." (§ 1181, subd. (6).) When a defendant argues that a new trial should be granted because a jury's guilty verdict is contrary to the evidence, he or she is asking the court to decide for itself, sitting as the 13th juror, whether the evidence has proved the defendant guilty beyond a reasonable doubt. (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133 (*Porter*).)

The analysis a court must apply when deciding a motion of this kind thus must be distinguished from the substantial evidence analysis it may carry out in any of several other procedural situations, such as a motion for a judgment of acquittal based on legal insufficiency of the evidence (§ 1118.1), a post-verdict motion to dismiss premised specifically on legal insufficiency of evidence (§ 1385), or an appeal based on a claim of such insufficiency. In those situations, the court must determine whether the evidence is sufficient as a matter of law to support a guilty verdict. It must decide whether, in light of the evidence, *any* reasonable fact finder could reach the same conclusion as the jury.

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**5** *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

In the type of motion at issue here, by contrast, the court must ask itself whether it is actually persuaded by the evidence that the defendant is guilty beyond a reasonable doubt—the same task jurors must perform. (*Porter*, *supra*, 47 Cal.4th at p. 133; *People v. Pedroza* (2014) 231 Cal.App.4th 635, 643-645.)

As mentioned, the above description of the facts is based on John's testimony, but he gave other testimony inconsistent with it. In addition, his testimony exhibited peculiarities that the court could reasonably have viewed as casting doubt on the reliability of his memory and his capacity for accurately describing events as they really happened.

An example of many inconsistencies and peculiarities in his testimony include:

- Jackson threw the stucco, then he hit John and took the backpack, and then John chased him and pepper sprayed him. Jackson hit John and then threw the stucco; but John pepper sprayed Jackson before Jackson hit him. John already had the can of pepper spray in his hand before Jackson threw the stucco because he believed Jackson wanted to punch him. Jackson asked for a quarter, then took the backpack and ran; next John chased Jackson and pepper sprayed him, and then Jackson threw the stucco.

Jackson's trial testimony was fairly detailed. He admitted he was the other person involved in the altercation in question, even though John was unable to identify him in the courtroom. But he said it was John who was the aggressor.

Jackson said he arrived at the bus stop intending to ride the bus to his son's school to pick him up after kindergarten. He had a spare all-day bus pass and tried to sell it to John for a dollar. John reacted with hostility and Jackson put the extra bus pass away and tried to ignore John.

But John threatened to hit Jackson and pepper spray him. Jackson said John was pointing a can of pepper spray at him and coming around the bus stop bench toward him. Jackson told John to get the pepper spray can away from his face, but John continued saying he was going to spray him. Jackson saw what he described as a rock on the

ground. He picked it up and threw it at the ground near John's feet. John flinched but did not duck, and continued moving toward Jackson as Jackson continued to back away. Jackson picked up another rock, still telling John to put the spray away, and threw it at the ground near John's feet, not trying to hit him. He just wanted John to put the can down and leave him alone. The second rock had no effect, and after Jackson picked up a third one, John sprayed him in the face. Jackson dropped the rock. He could see little with the pepper spray in his eyes. He moved toward John and punched him in the face. They wrestled and struggled, and Jackson dislocated his knee.

Jackson picked John's backpack up from the bench and slammed it down in the street. He said he never had any intention of taking the backpack away. As he hobbled away, a friend spotted him while driving by. The friend put his knee joint back into place and drove him to the nearby home of his sister. There he called an ambulance, which took him to a hospital.

Deputies came looking for Jackson while he was in the emergency room. One questioned him about how he got hurt. Jackson testified he made up a story about how three men had attacked him. He did not yet understand that he was suspected of having committed a crime himself, and he did not want to be a snitch and get John in trouble. He thought the incident was not a big deal and did not warrant police involvement. But then the deputy implied to Jackson (falsely) that there was surveillance video of his altercation with John, at which point Jackson told the deputy the truth.

The deputy who questioned Jackson at the emergency room, Aaron Barajas, also testified at trial. Barajas said that after providing an initial story about a fist fight with three men, Jackson eventually said—when Barajas implied he had a surveillance video of the bus stop incident—that he encountered John when he was walking past the bus stop bench and needed to sit down to tie his shoe laces. Thereafter, Jackson's account followed along the lines of his trial testimony, except he did not mention he had punched

John. Barajas testified that he asked Jackson why he began by telling a made-up story. Jackson said he was embarrassed that he had been pepper sprayed by an older man.

On cross-examination, defense counsel asked Barajas how John described the incident. Barajas testified John had trouble keeping things in order and had difficulty communicating in a way Barajas could understand. Barajas believed, however, that the order of events recorded in his report—Jackson threw a rock, then punched John, then grabbed John's backpack, and then John pepper-sprayed Jackson—was the order John intended to convey.

We need not resolve Jackson's claim of ineffective assistance of counsel. As addressed below, we will remand this matter for a new sentencing hearing, in light of ameliorative amendments to the statutes under which prior serious felony and prior prison enhancements are imposed. (See *People v. Buycks* (2018) 5 Cal.5th 857, 893.) In doing so, we vacate the sentence. (See *People v. Wilcox* (2013) 217 Cal.App.4th 618, 625 [the sentence is the judgment in a criminal case].). Jackson may therefore bring a new trial motion on remand.[6] (*People v. Hales* (1966) 244 Cal.App.2d 507, 511 ["If the judgment is vacated or set aside, the motion for new trial may then be entertained."]; *People v. Robarge* (1953) 41 Cal.2d 628, 635; §§ 1182, 1202.)

### *II. Errors in Verdict Form and Jury Instructions for Simple Assault*

In count 2, the information charged Jackson with assault with a deadly weapon. On a form headed "SIMPLE ASSAULT," a jury instruction stated that the jury could find Jackson guilty on count 2 of the lesser offense of "assault in violation of Penal Code section 242." Section 242 defines simple battery, not simple assault. Assault is defined

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**6** We note, to the extent a new trial motion is filed and is successful, that any new trial can proceed on a lesser offense of which the defendant was convicted, but not a greater offense of which he or she was acquitted, regardless of the fact that the new trial was a consequence of the defendant's request. (*People v. Gilmore* (1854) 4 Cal. 376, 376-379, *People v. Fields* (1996) 13 Cal.4th 289, 305-308, § 1023.)

in section 240. The instruction stated the elements of simple assault correctly, however. The jury received a verdict form giving it the option of finding Jackson "guilty of Misdemeanor, to wit: Battery, in violation of Section 242 of the Penal Code, a lesser but necessarily included offense in the crime charged in the second count of the Information." There was no verdict form that referred to simple assault. In their closing arguments, the attorneys did not mention the lesser included offense on count 2 by name. The prosecutor made a brief reference to the verdict form for the lesser included offense on count 2, but did not talk about what offense that was. Defense counsel did not refer to the lesser included offense on count 2 at all.

The jury's verdicts on count 2, as reflected in the verdict forms signed by the foreperson, were not guilty of assault with a deadly weapon and guilty of the lesser included offense of "Battery, in violation of Section 242." The jury was polled, but only on count 1. The offense of conviction on count 2 was recorded as "PC 242" in the court's minute order.

Jackson contends that the mistaken reference in the verdict form to battery, and the mistaken reference in the jury instructions and the verdict form to section 242, constituted reversible error on count 2, in that he stands convicted as a result of these mistakes of an offense with which he was never charged, and that is not a lesser offense included in any offense with which he was charged.

We disagree. There is not the least indication in the record that the jury was confused by these mistakes. The substance of the jury instruction at issue—i.e., the elements of the lesser included offense—was correct. There is no likelihood whatsoever that the crime of which the jury found Jackson guilty on count 2 was, in the minds of the jurors, anything other than simple assault as defined in the instruction. It is virtually inconceivable that, seeing the word battery and the citation to section 242, the jurors decided to substitute the elements of battery for those shown in the instruction, and find those were proved instead. "[T]echnical defects in a verdict may be disregarded if the

jury's intent to convict of a specified offense within the charges is unmistakably clear." (*People v. Webster* (1991) 54 Cal.3d 411, 447.) That standard is satisfied. Nothing more will be necessary (if the current convictions ultimately remain the basis of the judgment in this case) than a correction to the minute order.

### *III. Section 654*

Jackson contends that the trial court erred when it did not stay the sentence for misdemeanor simple assault pursuant to section 654. We agree.

Section 654 provides, in part, as follows:

> "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision."

This statute bars multiple punishment not only for a single criminal act but for a single indivisible course of conduct in which the defendant had only one criminal intent or objective. (*People v. Bauer* (1969) 1 Cal.3d 368, 376; *In re Ward* (1966) 64 Cal.2d 672, 675-676; *Neal v. State of California* (1960) 55 Cal.2d 11, 19, overruled on other grounds by *People v. Correa* (2012) 54 Cal.4th 331, 344.) We review under the substantial evidence standard the court's factual finding, implicit or explicit, of whether or not there was a single criminal act or a course of conduct with a single criminal objective. (*People v. Coleman* (1989) 48 Cal.3d 112, 162; *People v. Ratcliff* (1990) 223 Cal.App.3d 1401, 1408.) As always, we review the trial court's conclusions of law de novo. (*Hill v. City of Long Beach* (1995) 33 Cal.App.4th 1684, 1687.)

As will be seen, the substantial evidence standard is of particular importance in the analysis here. We refer to that standard in passing above. For purposes of the section 654 issue in this case, a more detailed discussion of it may be helpful.

When considering a challenge to the sufficiency of the evidence to support a finding, we review the record in the light most favorable to the finding and decide whether it contains substantial evidence from which a reasonable finder of fact could

make the finding under the applicable standard of proof. The evidence must be reasonable, credible and of solid value. We presume every inference in support of the finding that the finder of fact could reasonably have made. We do not reweigh the evidence or reevaluate witness credibility. We cannot reject the judgment merely because the evidence could be reconciled with a contrary finding. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 293.)

Although this standard is deferential, it is not the case that "an appellate court should sustain a conviction [or a finding] supported by any evidence which taken in isolation might appear substantial, even if on the whole record no reasonable trier of fact would place credit in that evidence." (*People v. Johnson* (1980) 26 Cal.3d 557, 577 (*Johnson*.) Our Supreme Court has cautioned against misinterpreting the substantial evidence standard in this way:

> "As Chief Justice Traynor explained, the 'seemingly sensible' substantial evidence rule may be distorted in this fashion, to take 'some strange twists.' 'Occasionally,' he observes, 'an appellate court affirms the trier of fact on isolated evidence torn from the context of the whole record. Such a court leaps from an acceptable premise, that a trier of fact could reasonably believe the isolated evidence, to the dubious conclusion that the trier of fact reasonably rejected everything that controverted the isolated evidence. Had the appellate court examined the whole record, it might have found that a reasonable trier of fact could not have made the finding in issue. One of the very purposes of review is to uncover just such irrational findings and thus preclude the risk of affirming a finding that should be disaffirmed as a matter of law.' (Traynor, The Riddle of Harmless Error (1969) p. 27.) (Fns. omitted.)" (*Johnson, supra*, 26 Cal.3d at pp. 577-578.)

Assuming the evidence was legally sufficient to establish that an assault and an attempted robbery took place (a point we are not asked to address), it nevertheless was insufficient to support a finding that Jackson had two objectives.

As noted above, John's testimony was contradictory. Frequently, a record containing conflicting evidence—some supporting a finding of multiple objectives and some undermining such a finding—readily suffices to sustain the imposition of multiple

unstayed punishments. But not always, and not in this case. For here, the evidence supporting a finding of multiple objectives—John's testimony—simultaneously undermined it. The shifting nature of John's account would preclude a reasonable factfinder from ascribing more than one criminal objective to Jackson based on it.

The argument in the People's appellate brief well illustrates how reliance on John's account does not work to support a finding of multiple criminal objectives. The People contend that the assault conviction "was clearly based on [Jackson] throwing rocks at [John]." There was evidence "that [Jackson] initially began throwing rocks at [John] because he was angry when [John] declined to give him money." The next thing that happened, according to some of the evidence, was that Jackson punched John; and after that he took the backpack. In this way, the People aver, "the record supports a conclusion that [Jackson's] criminal intent in throwing the rocks was to attempt to injure [John] because he was angry, while his intent in punching [John] was to achieve the robbery of his backpack."

The People's argument thus depends on the existence of substantial evidence to show that events happened in a certain order: (1) Jackson threw rocks in an effort to hurt John because he was angry about the 25 cents. (2) Jackson punched John, his purpose now shifting to that of taking the backpack. (3) Jackson took the backpack and began to run, consummating the robbery and leading to his being pepper sprayed. John's testimony did indeed give support to this sequence. (We will assume for the sake of argument that this sequence in turn gave support to the inferences that Jackson threw rocks *because* he was angry, but delivered the punch or punches to carry out the robbery.) The trouble is that John's testimony also gave support to variations in this sequence. Maybe Jackson grabbed the backpack and ran just after asking for the quarter; then John chased and sprayed him, leading Jackson to throw stucco. Or maybe John pepper sprayed Jackson first, leading to Jackson punching, throwing stucco, and taking the backpack. This record is an excellent illustration of Chief Justice Traynor's point that

even when one portion of the record in isolation would allow a reasonable factfinder to find a given fact, other portions can show that the finding would not be reasonable after all.

Barajas testified that when he interviewed John, John had trouble keeping the sequence of events in order. He also testified to his opinion that the sequence he wrote down in his report (the same sequence on which the People here rely) was the one John was trying to convey. No foundation was given for this opinion, however. Barajas was not asked, for instance, whether he read his notes back to John so John could confirm Barajas's understanding. A reasonable factfinder was thus left in the same position he or she was in after hearing John's testimony: maybe one sequence was the real one, maybe another.

For these reasons, we conclude the evidence was not sufficient to support a finding that, during a single course of conduct constituting both simple assault and attempted robbery, Jackson acted with one criminal objective while committing simple assault and another while committing robbery. The misdemeanor sentence for the assault should have been stayed under section 654.[7]

### *IV. Sentencing Discretion on the Section 667, Subdivision (a) Enhancement*

Senate Bill No. 1393 (2017-2018 Reg. Sess.; Senate Bill No. 1393), effective January 1, 2019, amended sections 667 and 1385 to delete a restriction prohibiting a

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[7] Jackson's testimony and his statement to Barajas provide no support for a finding that Jackson acted with two distinct criminal objectives. According to Jackson's testimony, he threw something at John because John was menacing him with the pepper spray can; he punched John because John was spraying him, and he picked up and threw the backpack because he was angry about being sprayed. Barajas's description of Jackson's statement is similar: John got the pepper spray can out in response to Jackson's rude request that John move the backpack; then Jackson threw rocks, got pepper sprayed, and picked up the backpack and threw it at John in anger. Jackson's testimony thus fails to support a finding of any criminal objectives, and Jackson's statement as recounted by Barajas supports one (trying to hurt John with the rocks and/or the backpack) at most.

judge from striking a prior serious felony conviction for purposes of the five-year enhancement under Penal Code section 667, subdivision (a). (Stats. 2018, ch. 1013, §§ 1-2.) The new law is in effect now, but was not in effect at the time of sentencing.

As statutes that give the trial court discretion to impose a lower sentence than was possible before, the amendments apply retroactively to cases not yet final on direct appeal, like this one. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76.) "[T]he appropriate standard … when a trial court is unaware it has the discretion to reduce a sentence" because of a law soon to come into effect that will be retroactively applicable, is that "[r]emand is required [to allow the trial court to exercise its new discretion] unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it [knew it would soon be deemed to have] had the discretion to do so." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110.)

The parties agree that the new law applies retroactively, that there is no clear indication in the record of how the trial court would have exercised its discretion in relation to the five-year enhancement, and that remand is required to allow it to exercise this discretion. A resentencing hearing will be required for this purpose unless there is a new trial.

***V. Amendment to Section 667.5, Subdivision (b)***

Another sentencing amendment also has come into effect since Jackson's sentencing. This is Senate Bill No. 136 (2019-2020 Reg. Sess.; Senate Bill No. 136), enacted October 8, 2019, which amended Penal Code section 667.5, subdivision (b), to limit the prior offenses to which it applies. Under the law as amended, in order for a prior prison term enhancement under this statute to apply, the underlying prior prison term must be for "a sexually violent offense as defined in subdivision (b) of Section 6600 of the Welfare and Institutions Code." (§ 667.5, subd. (b); Stats. 2019, ch. 590, § 1.)

The parties agree that the amended law applies retroactively and that it does not apply to Jackson's prior convictions, none of which are for a sexually violent offense as

contemplated by the new statute. The prior prison term enhancements previously imposed must therefore be stricken.

## DISPOSITION

The convictions of attempted robbery (§ 664/212.5, subd. (c)) and assault (§ 240) are affirmed. The trial court is ordered to amend the sentencing minute order to reflect the conviction on count 2 is for section 240 and to forward the amendment to the appropriate authorities. Sentence is vacated. The case is remanded to the trial court with direction to strike the enhancements imposed pursuant to section 667.5, former subdivision (b), and to exercise its discretion under Senate Bill No. 1393. Should defendant choose to do so, he may bring a motion for new trial but must do so prior to resentencing.

SMITH, J.

WE CONCUR:

POOCHIGIAN, Acting P.J.

DETJEN, J.